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No. 95-_____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1995

E.R. MYERS, Warden, et al., *Petitioners*

v.

GREGORIO JIMINEZ, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After this Court denied California's first petition for certiorari in this case, the United States Court of Appeals for the Ninth Circuit filed an amended opinion which was more injurious than its first opinion. Specifically, in its amended opinion, the Ninth Circuit invented a new doctrine called the "de facto Allen charge." Moreover, although the Ninth Circuit has now filed two opinions in this case, it has not felt compelled to address the Teague question raised by California in either one.

The question presented is:

Whether the Ninth Circuit's new explanation for its grant of relief amounts to a "new rule" of law that cannot be applied retroactively to invalidate the state judgment.

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PETITION FOR WRIT OF CERTIORARI

The State of California hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

After this Court denied California's petition for writ of certiorari on October 3, 1994, the Ninth Circuit amended part II of its original published opinion. The amended published opinion, Gregorio Jimenez v. E.R. Myers, Warden, No. 91-56476, filed on October 28, 1994, is attached as Appendix A. The original opinion, filed on December 8, 1993, is attached as Appendix C.

JURISDICTION

The original judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 8, 1993. That Court denied a timely petition for rehearing and suggestion for rehearing en banc on January 20, 1994. App. D. On October 28, 1994, the United States Court of Appeals filed an amended opinion; a timely petition for rehearing and suggestion for rehearing en banc was denied on February 21, 1995. App. B.

The jurisdiction of this Court is invoked

pursuant to Title 28, United States Code, section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 of the United States Code, section 2254(a) provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Respondent Gregorio Jimenez shot Leticia Trovao twice after she rejected his proposal of marriage. Leticia suffered a collapsed lung as a result of the shooting.

Respondent's trial for attempted murder was by jury. The case was submitted to the jury on November 3, 1988, at 9:15 a.m. CT 118. After hearing readback testimony for one hour and deliberating for only two hours and

forty-five minutes, the jury sent a note to the court which said, "We are unable to reach a verdict, and feel strongly that we would not be able to reach a verdict." CT 123, App. F.

At 4:34 p.m., the jury, at the request of the court, returned to the courtroom where the following colloquy between the judge and foreperson occurred:

> THE COURT: For the record, we're now in the presence of all the jurors. . . Mrs. Clingan . . .[¶] . . . You're the foreperson, correct?
>
> THE FOREMAN: Yes.
>
> THE COURT: You have given us a note indicating [sic] unable to reach a verdict.
>
> [¶] What I would like to do is make a couple of general inquiries only of you in a general way, no specifics. [¶] It's been just a little over an hour from the time that the readback was had until you

sent your note to me. You've been out roughly one day now deliberating. [¶] What I would like to know, how many votes have been taken?

THE FOREMAN: Five or six.

THE COURT: Without telling me which direction, just numerically, how did it start, and what was it on the last?

THE FOREMAN: . . . To the best of my recollection, it started out about maybe seven to five, eight to four. Went to nine to three. All right. To back up, this morning, nine, two, and one.

THE COURT: It's gone to one now?

THE FOREMAN: Eight to four, nine to three?

THE COURT: If you can recall, just generally the voting.

THE FOREMAN: This afternoon though,

nine to three.

THE COURT: All right. So you did have - How about in between, nine-two and one and then the nine-three, has there been movement one way or the other?

THE FOREMAN: Nine-one-two, I would say at this point. And yes, there has been some movement in one direction.

THE COURT: Okay. Well, that's what's important to me because of the nature of the type of case. I want to find out that there has been movement. [¶] It will be my intent at this point in time, based upon what I've heard so far, what's happened so far, is to allow you to leave at this time for the weekend. I know that Mr. Davis has his problem with his airline tickets, but I'm going to ask that you come

back on Monday morning at 9:00 o'clock for deliberation at least for the morning to see if we have any further movement because that will [be] my intention at this time. . . II RT 439-441.

On November 7, 1988, at 9:00 a.m., after a long weekend, the jury resumed deliberations. After 17 minutes the jury foreman sent a note to the court asking for "a written copy of the law as it pertains to this case, as well as jury instructions as it pertains to this case." CT 131. Closing arguments of both counsel were also requested by the jury. CT 132. The court sent the jury instructions back into the jury room but ultimately denied the request for rereading of counsel's closing arguments. Deliberations continued until noon. CT 132.

Following an hour and a half lunch break, the jury reconvened and resumed deliberations. CT 132. At 2:03 p.m., the court received a

note from the jury requesting further directions because of impasse. CT 133. At 2:35 p.m., the jury reentered the courtroom where the following colloquy between the judge and foreperson occurred:

> THE COURT: . . . I've received your note. 'We are at an impasse and request further direction.' Is that still the posture of the jury?
>
> THE FOREMAN: Yes.
>
> THE COURT: Okay. Now, last Friday I inquired of you as to whether or not there had been any movement by the jury. [¶] So I'll ask that same question again with the understanding, all I want is numbers, not which direction that you're at. How many votes have you taken since last Friday?
>
> THE FOREMAN: Two or three. Two.
>
> THE COURT: Two more?
>
> THE FOREMAN: Uh-huh.

THE COURT: What's the latest?

THE FOREMAN: Eleven-one.

THE COURT: So there has been, then, substantial movement since the last time.

THE FOREMAN: Yes.

THE COURT: All right. Due to the fact we have had that type of movement, I would request, then, to finish rest of today and see where we are at that point in time. All right? Okay. We'll see you back. Have you taken your afternoon break yet?

THE FOREMAN: No, we haven't. II RT 448-449.

Out of the presence of the jury, defense counsel moved for a mistrial. The trial court determined the jury's progress since the previous day of deliberation and the emotional tenor of the case warranted two more hours of additional deliberation. If the jury was

deadlocked at 4:30 p.m., the court was prepared to declare a mistrial. II RT 450-451. Between 4:25 and 4:30 p.m., the jury returned a guilty verdict to the charge of attempted murder. CT 125.

Respondent Jimenez was subsequently sentenced to ten years in state prison. CT 141-142. The California Court of Appeal, Fourth Appellate District, Divsion Two, affirmed the conviction. App. F. A petition for review was denied by the California Supreme Court.

Respondent Jimenez then filed a petition for writ of habeas corpus in the United States District Court. The District Court denied the writ. App. E. On December 8, 1993, the United States Court of Appeals for the Ninth Circuit, in a published opinion, reversed the District Court's order denying habeas corpus relief. The three-judge panel voted two to one, with a very strong dissent by Circuit Judge Kozinski. App. C.

On December 22, 1993, California filed a petition for rehearing and suggestion for rehearing en banc. On January 20, 1994, the Ninth Circuit denied that petition. The Court, on its own motion, stayed issuance of the mandate pending further order from the Court.

On April 20, 1994, California filed a petition for writ of certiorari in this Court. In that petition, California presented two questions: 1) whether the Ninth Circuit had the authority to impose its own rule upon California's criminal procedure for dealing with deadlocked juries; and 2) whether the Ninth Circuit's ruling applied a "new rule" for the first time on collateral review pursuant to Teague v. Lane, 489 U.S. 288.

On May 18, 1994, on its own motion, the Ninth Circuit ordered Jimenez to respond to the petition for rehearing and suggestion for rehearing en banc which California had filed on December 22, 1993, and which the Ninth

Circuit had denied on January 20, 1994.

On October 3, 1994, this Court denied California's petition for writ of certiorari.

On October 28, 1994, the United States Court of Appeals for the Ninth Circuit amended part II of its opinion. In the amended opinion, the Ninth Circuit went beyond its earlier statement that "Allen charge cases are relevant."[1] App. C. In its amended opinion, the panel held that "the trial court's comments and conduct amounted to giving the jury a 'de facto Allen charge,' which instructs the jurors to work towards unanimity and the minority to reexamine its views." The panel equated the trial court's "failure to counterbalance the implication of its questions and comments by instructing the hold-out juror not to surrender his or her sincere convictions" with the failure to supplement an Allen charge with a cautionary

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1. Allen v. United States, 164 U.S. 492 (1896).

instruction. The panel concluded "from all the circumstances" that the trial judge impermissibly coerced a unanimous verdict and denied Jimenez a fair trial. App. A.

Circuit Judge Kozinski again wrote a sharp dissent. Circuit Judge Kozinski stated, "The majority has made a bad situation worse. In its earlier opinion, it merely held that `our Allen charge cases are relevant.' Today, it invents a whole new doctrine - the `de facto Allen charge.'" Circuit Judge Kozinski further stated:

> With all due respect to my colleagues, this is sheer phantasy. What happened here is *nothing* like giving an Allen charge, where the trial judge explicitly exhorts jurors to try to achieve unanimity. The idea that we can piece together a de facto Allen charge from a trial judge's questions and comments, none of which exhorts the jury to do

anything at all, is far more novel and far more dangerous than what the majority said the last time around. Teague v. Lane, 489 U.S. 288 (1989), is clearly implicated. App. A.

On February 21, 1995, the Ninth Circuit denied California's petition for rehearing and suggestion for rehearing en banc. App. B. On March 9, 1995, the Ninth Circuit granted California's motion for stay of the mandate.

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

The Ninth Circuit wrote two opinions in this case, and did not feel compelled to address the Teague question in either one. App. A, C. This fails to comport with the express demand of this Court, that courts are to consider the Teague question as the threshold question in every habeas case.

The Ninth Circuit's failure to address Teague before considering the merits of Jimenez' claim was particularly injurious to

California, because the Ninth Circuit announced a new rule in this case. Specifically, the Court placed a new condition upon California's use of numerical inquiries to deadlocked juries, by ruling that a neutral numerical inquiry will become a "de facto Allen charge" unless it is accompanied by a second cautionary instruction. Since the decision in this case imposed a new obligation on California jurists, and since the result was not dictated by precedent existing at the time Jimenez' conviction became final, California submits the Ninth Circuit clearly announced a new rule in this case.

Rather than acknowledge that it had announced a new rule, the Ninth Circuit classified its conclusion as simply the result of an application of the totality of the circumstances test. App. C. If the Ninth Circuit had followed the mandate of this Court and addressed the Teague issue first, however, it could not have disguised its new rule

behind the totality of the circumstances test.

As it stands, the Ninth Circuit has ignored the mandate of this Court and the "new rule" principle, which validates reasonable, good faith interpretations of existing precedents made by state courts. Graham v. Collins, ___ U.S. ___, 113 S. Ct. 892, 897, 122 L. Ed. 2d 260 (1993).

As noted by Circuit Judge Kozinski in his original dissent, "this ruling bodes ill for countless convictions in California and other states that follow the California practice." Appendix C. The validity of state convictions are at stake.

B. ARGUMENT

THE COURT OF APPEALS WAS REQUIRED TO ADDRESS THE TEAGUE ISSUE BEFORE CONSIDERING THE MERITS OF JIMENEZ' CLAIM

Time and again, this Court has held that a "new rule" of constitutional law, or even a settled rule applied in a novel setting, cannot work retroactively in federal habeas corpus proceedings to invalidate a final state

criminal conviction. Teague v. Lane, 489 U.S. 288, 305-311, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); see also Stringer v. Black, 503 U.S. ___, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992); Butler v. McKellar, 494 U.S. 407, 110 S. Ct. 1212, 1217, 108 L. Ed. 2d 347 (1990). The retroactivity rule was motivated by a respect for the States' strong interest in the finality of criminal convictions, and the recognition that a State should not be penalized for relying on the "constitutional standards that prevailed at the time the original proceedings took place." Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180 (1993).

This Court has also continuously reaffirmed that the threshold question in every habeas case is whether the court is obligated to apply the Teague rule to the defendant's claim. Caspari v. Bohlen, ___ U.S. ___, 114 S. Ct. 948, 953, 127 L. Ed. 2d 236 (1994); see also, Sawyer v. Smith, 497

U.S. 227, 110 S. Ct. 2822, 2826-2827, 111 L. Ed. 2d 193 (1990); Saffle v. Parks 494 U.S. 484, 110 S. Ct. 1257, 1259-1260, 108 L. Ed. 2d 415 (1990); Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 2952, 106 L. Ed. 2d 256 (1989). Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. Teague v. Lane, 489 U.S. at 300. Thus, the question of retroactivity must be determined *before* the merits of a defendant's claim.

The Ninth Circuit wrote two opinions in this case, and did not feel compelled to address the Teague question raised by California in either one. The Ninth Circuit made no attempt to resolve the retroactivity issue; since the Teague issue was raised and rejected in the last sentence of its amended opinion, California submits the Teague issue

was not addressed at all.

Pursuant to this Court's precedent, the Ninth Circuit was required to address the Teague issue *before* considering whether the trial court's conduct and comments in this case violated the Constitution. Caspari v. Bohlen, 114 S. Ct. at 953. The Ninth Circuit's failure to address Teague as a threshold issue in this case was particularly injurious, because the Ninth Circuit announced a new rule.

A case announces a new rule when it breaks new ground, imposes a new obligation on the States or the Federal Government, or if the result was not dictated by precedent existing at the time the defendant's conviction became final. Butler v. McKellar, 494 U.S. 407, 414 (1990). Every rule of law is "new" for Teague purposes, and thus unenforceable in federal habeas corpus proceedings, unless it was so clearly dictated by pre-existing precedent that "all reasonable

jurists would have deemed themselves compelled to accept" the claim at the time of the finality of the petitioner's conviction. Graham v. Collins, ___ U.S. ___, 113 S. Ct. 892, 897, 122 L. Ed. 2d 260 (1993).

In determining whether Teague applies, the federal court must ascertain 1) the date on which the defendant's conviction became final for Teague purposes; 2) the legal landscape as it then existed; and 3) whether either of the two narrow exceptions to the nonretroactivity principle apply. Caspari v. Bohlen, 114 S. Ct. at 953.

The California Supreme Court denied Jimenez' petition for review on March 21, 1990. Since Jimenez did not file a petition for a writ of certiorari, the conviction became final 90 days later. Caspari v. Bohlen, 114 S. Ct. at 954; Rules of the Supreme Court of the United States, Rule 13.

As to the legal landscape as it existed then and now, California's highest court has

consistently determined that a judicial inquiry into the jury's division is noncoercive and entirely appropriate. People v. Rodriquez, 726 P.2d 113, 142, n. 14 (1986); see also People v. Proctor, 842 P.2d 1100 (1992). That Court has also ruled that use of the Allen charge is coercive and reversible error. People v. Gainer, 566 P.2d 997 (1977). The trial judge in this case reasonably relied on that precedent during the course of the trial. Since the "new rule" principle of Teague serves to validate reasonable, good faith interpretations of existing precedents made by state courts even though they are later shown to be contrary to later decisions (Butler v. McKellar, 494 U.S. at 415; Sawyer v. Smith, 497 U.S. 227, 234 (1990)), the Ninth Circuit's decision that the trial judge gave a "de facto Allen charge" by inquiring into the jury's numerical division is a new rule.

Finally, neither of the two narrow exceptions to the nonretroactivity principle

apply in this case. The rule does not place any conduct, much less primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. Nor does the rule embody a procedure without which the likelihood of an accurate conviction is seriously diminished. Teague v. Lane, 489 U.S. at 307-313.

The Ninth Circuit stated it did not question the practice of California judges to ask the jury its numerical division after an impasse. Thus, the Court determined it had not announced a new rule in this case, but instead simply applied the well-established "totality of the circumstances" test. App. C.

However, "the fact that a court says that its decision is within the `logical compass' of an earlier decision, or indeed that it is `controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a `new rule' under Teague." Butler v. McKellar, 494 U.S. 407,

415 (1990). Novelty turns on whether the rule would represent a "development in the law over which reasonable jurists could disagree." Sawyer v. Smith, 497 U.S. at 234.

If the Ninth Circuit had considered the Teague question in the manner mandated by this Court, it would have been clear that the rule announced in this case -- that a trial court's neutral numerical inquiry will become a "de facto Allen charge" if it is not accompanied by a second cautionary instruction -- was surely susceptible to debate among reasonable legal minds. Butler v. McKellar, 494 U.S. at 415.

Even assuming the Ninth Circuit did not announce a "new rule" in this case, it is still necessary to inquire whether that Court applied a settled rule in a novel way. Teague also applies if granting the relief sought would create a new rule by applying a prior decision in a novel setting, thereby extending the precedent. Stringer v. Black, 503 U.S.

___, 112 S. Ct. 1130, 1135, 117 L. Ed. 2d 367 (1992). The interests in finality, predictability, and comity underlying the new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent. Ibid.

The question is not whether application of the "totality of the circumstances" test is a new rule. It is not. Nor is the question whether a trial court's statements to a jury can be so coercive as to rise to the level of a constitutional violation. It is clear they may. See Gilmore v. Taylor, 113 S. Ct. at 2121-2122, (O'Conner, J., concurring opinion). The question is whether the Ninth Circuit's conclusion -- that the neutral inquiry by the trial court in this case became a "de facto Allen charge" because it was not accompanied by a second cautionary instruction -- constitutes an extension of precedent, "a new

rule of law," that should not have been retroactively imposed to defeat the state conviction in this case.

The term "Allen charge" is the generic name for a class of supplemental jury instructions given when jurors are apparently deadlocked. The Allen charge stands at the brink of impermissible coercion, and even in its most acceptable form the charge approaches the ultimate permissible limit. United States v. Mason, 658 F.2d 1263, 1265-1266 (9th Cir. 1981.)

While the Allen charge specifically places pressure on the minority jurors to re-examine their views, the trial court's inquiry to the jury in this case was neutral and no pressure was placed on individual jurors. The court was careful not to ask which way any individual juror had voted, and did not ask whether the majority was moving toward guilt or acquittal as the votes changed. The trial court never told the jury to seek unanimity

and certainly never told the minority jurors to reconsider their views. As Circuit Judge Kozinski says, the trial judge never exhorted the jury to do anything. Instead, the trial court merely requested that the jury continue to deliberate because there had been "movement" during deliberations indicating the possibility of a verdict.

Another well established precedent is that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. Cupp v. Naughten, 414 U.S. 141, 147. Also, it may be assumed a jury understood and followed the instructions given them. Francis v. Franklin, 471 U.S. 307, 324, n. 9 (1985). Here, the jury was specifically instructed not to surrender their individual views in favor of compromise and unanimity. App. C. The jury is deemed to have followed that instruction.

In sum, the Ninth Circuit's conclusion -

that the trial judge gave a "de facto Allen charge" which required a second admonishment in order to counterbalance the trial court's inquiry - was an extension of well-settled precedent.

As noted by Circuit Judge Kozinski in dissent, "Teague is clearly implicated" in this case. App. A. Specifically, the rule promulgated by the Ninth Circuit was not compelled by precedent (or in the alternative constituted an extension of precedent), and did not fall within one of the two Teague exceptions. The "new rule" should not have been retroactively imposed to defeat the state conviction in this case.

Retroactive application of the Ninth Circuit's amended opinion in this case will significantly impair California's legitimate interest in maintaining convictions secured through procedures which complied with state and federal law. Therefore, California prays that this Court grant certiorari review.

CONCLUSION

The petitition for a writ of certiorari should be granted.

Respectfully submitted,

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